United States - Preliminary Determinations with Respect to Certain Softwood Lumber from Canada

WT/DS236

EXECUTIVE SUMMARY OF THE
ORAL STATEMENT OF THE UNITED STATES
AT THE SECOND MEETING OF THE PANEL

June 14, 2002

Financial Contribution

1. The provincial governments identify specific stands of timber and enter into tenure agreements that allow companies to harvest that timber, that is, to take the timber off the land, in exchange for a fee based on the volume of timber harvested. The provincial governments are therefore providing a good within the meaning of Article 1.1(a)(1)(iii) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

2. Canada's attempts to argue to the contrary defy general principles of treaty interpretation, the rules of logic and common sense. The essence of Canada's argument is that when the provincial governments grant lumber producers the right to take timber from government land, the producers actually provide *themselves* with a good when they cut down a tree. To support this rather extraordinary proposition, Canada ignores the ordinary meaning of "goods," which includes things to be severed from the land, such as timber. In Canada's view, a government can identify a whole forest of trees and give a specific lumber company the right to take those trees for free. The violence such a theory does to the subsidy disciplines is obvious.

3. Canada's strained interpretation is not supported by the text of the SCM Agreement. Based on the ordinary meaning of the text, when the provincial governments grant companies the right to take an identified good – timber – from government land, the government makes a financial contribution within the meaning of Article 1.1(a)(1)(iii) of the Agreement.

Benefit

4. A financial contribution confers a benefit if it provides some form of artificial advantage that would not otherwise be available in the marketplace absent the government's financial contribution. Under the guidelines in Article 14(d), the benefit from a government's provision of goods is to be determined in relation to the prevailing market conditions for the good in the country of provision. The United States shares the view of the European Communities that the concept of "prevailing market conditions in the country of provision" is sufficiently broad to permit consideration of prices for competitive goods commercially available on the world markets to purchasers in the country of provision.

5. That interpretation is firmly grounded in the text of the SCM Agreement and commercial reality. "Commercially available," as defined in the SCM Agreement, means that the choice between domestic and imported goods is unrestricted and depends solely on commercial considerations. Commercially available goods, both imported and domestic, compete in the domestic market and constitute the supply available to purchasers in the country of provision, that is, goods that the purchasers could obtain in the market absent the government's financial contribution.

6. Canada has acknowledged that "prevailing market conditions" in the country of provision include the available supply and that imports, which are part of the available supply, can, in appropriate circumstances, provide a market benchmark consistent with Article 14(d). Even under Canada's reading of Article 14(d), therefore, prices for competitive goods commercially

available on world markets fall within the universe of potential market benchmarks in certain cases. Because prices for competitive goods commercially available on world markets fall within the ordinary meaning of the terms used in Article 14(d), there is no basis to interpret that provision as precluding the use of such prices, under any circumstances.

7. As the Canada Aircraft panel stated, the purpose of a benefit analysis is to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case *but for* the financial contribution. Likewise, the Appellate Body stated that the analysis is to determine whether the recipient is better off than it would otherwise have been *absent the financial contribution*. Private prices for a good that are driven by government prices for that good do not represent prices that would otherwise have been available in the market *absent* the government financial contribution. The Commerce Department's preliminary investigation indicates that such is the case with respect to private stumpage prices in Canada.

8. Commerce found that the provincial governments control approximately 90 percent of the softwood timber supply. Moreover, tenure holders consistently harvest less than their annual allowable cut ("AAC") and, if necessary, a tenure holder may harvest in excess of its AAC. These undisputed facts indicate that Canadian lumber producers would have no incentive to purchase private stumpage unless the private seller was willing to meet, or better, the government's administratively set stumpage price. The record facts, when taken as a whole, support the Commerce Department's conclusion that private stumpage prices in Canada are integrally linked to the government prices and therefore could not logically serve as a benchmark.

9. Stumpage prices in contiguous U.S. states were the most logical choice. U.S. stumpage is commercially available to Canadian producers and the contiguous forests are generally comparable. The United States is the only country from which Canada obtains significant amounts of softwood timber. Canadian companies own timberland in the United States, bid on U.S. stumpage and regularly import U.S. timber.

10. In sum, the Panel should find that Article 14(d) permits the use of prices commercially available on world markets in appropriate circumstances. The Panel should also find that the use of such a benchmark was appropriate under the specific facts of this case.

Critical Circumstances

11. Canada argues in its second submission that, if the United States wishes to preserve the possibility of retroactively imposing definitive countervailing duties pursuant to a critical circumstances determination, it should provide in its laws for retroactive assessment. That is, however, precisely what suspension of liquidation does. Furthermore, Canada's assertion that U.S. Customs' practice resolves this issue is incorrect. Under U.S. law, an entry that is not liquidated within one year from the date of entry is deemed liquidated by operation of law at the rate of duty in effect at the time of entry. Countervailing duty investigations frequently take more

than a year to complete; the SCM Agreement permits the investigation to go as long as 18 months. Entries during the 90-day retroactivity period would, in such cases, be liquidated by operation of law and no retroactive countervailing duties could be imposed.

12. The United States also notes that Canada's flexible interpretation of Article 20.3 stands in stark contrast to its restrictive reading of Article 20.1. The United States therefore takes little comfort in Canada's assertion that Article 20.3, which on its face does not contain the limitations assumed by Canada, would not be interpreted as precluding the imposition of retroactive duties where the amount of the duties has not been guaranteed by cash deposit or bond.

Expedited Reviews

13. The United States has demonstrated that U.S. law provides the Commerce Department with discretion under section 751 of the statute to implement the United States' obligations under Article 19.3. Canada nonetheless asks the Panel to find "for the sake of clarity" that the United States has failed to implement its obligations under the SCM Agreement. Moreover, Canada even goes so far as to ask the Panel to make findings that the United States must implement its obligations in a specific fashion, not just in this case, but "in any other investigation." Such a request is, to say the least, inappropriate.

14. Where a Member's laws do not mandate WTO-inconsistent action, the Member is accorded the presumption that it will implement its obligations in good faith. The United States has demonstrated that the laws and regulations at issue do not mandate WTO inconsistent action or preclude it from implementing the obligations in Article 19.3 of the SCM Agreement. Therefore, the measures are not inconsistent with the SCM Agreement. No further findings or recommendations are necessary or appropriate.

15. Canada has also misstated the United States' position with respect to administrative reviews. Canada notes that the United States stated that Section 351.213(b) of the Commerce Department's regulations does not apply to aggregate cases. Canada fails to note, however, that the United States also stated that the regulation does not restrict the Commerce Department's authority to conduct reviews. More importantly, however, the regulations cited by Canada govern only assessment proceedings and Article 21.2 does not address assessment proceedings.

Factual Support for the Preliminary Determination

16. The factual record at the time of the Preliminary Determination consists largely of the information that Canada submitted in its initial responses to the Commerce Department's questionnaire. The United States has provided the Panel with a great deal of that information. The United States therefore finds very disturbing Canada's serious and entirely baseless accusation that the United States has wilfully misrepresented certain facts concerning tenures in Alberta. The documents provided by the United States speak for themselves.

17. Canada also argues at length in its second submission about the Commerce Department's preliminary adjustments. Although the United States could refute those claims, they are not before the Panel for the simple reason that Canada has not challenged those adjustments in this proceeding. Canada's eleventh hour attempt to expand the Panel's terms of reference is improper and should, therefore, be rejected.

18. Moreover, Canada cites its criticisms of the adjustments in an attempt to bolster its argument that the use of a cross-border comparison is prohibited *per se*. In doing so, Canada attempts to give the impression that the study relied upon by Canada to support this argument is the only record evidence on this issue. In fact, the record at the time of the Preliminary Determination contains extensive evidence that the U.S. stumpage prices in contiguous states provide a very reasonable and logical basis for determining the market value of Canadian timber.

19. Canada also accuses the United States of engaging in post hoc rationalizations. Canada has not, however, claimed that the Preliminary Determination is inconsistent with Article 22 of the SCM Agreement regarding public notice and explanation of determinations.

20. The United States would now like to turn the Panel's attention to certain record facts before the Commerce Department at the time of the Preliminary Determination. The debate over the record facts has primarily centered on two issues: processing requirements imposed on tenure holders by the provincial governments and private stumpage prices in Canada.

Processing Requirements - Independent Loggers

21. With respect to tenure processing requirements and the existence of so-called independent loggers, the United States would stress at the outset that the benefit calculation was based solely on the volume of Crown timber that went into the production of softwood lumber. Data pertaining to other tenure types, to timber from private lands or to timber going to the production of other types of products are entirely irrelevant.

22. In addition, the record at the time of the Preliminary Determination indicates that the vast majority of Crown timber obtained by lumber producers was provided by the provinces directly to those producers. The record also indicates that, due to the restrictions imposed by the provinces, any truly arm's-length transactions for the small amount of timber that a lumber producer may have acquired outside its own tenure are insignificant. In short, the record at the time of the Preliminary Determination does not indicate that pass-through is an issue, nor did Canada raise it as an issue until the day before the Preliminary Determination.

Private Prices

23. Canada attempts to argue around the fact that only three provinces provided any information concerning non-government prices for stumpage. The fact remains that Alberta

provided a single estimated stumpage value for all species and quality of trees; a value that is calculated by the province for the purpose of settling disputes over damaged timber. The United States provided the Panel with a copy of the Resource Information Systems study, which Ontario submitted to the Commerce Department. I refer the Panel to the United States' previous comments on the study and to the study itself, which we believe confirm the validity of the Commerce Department's assessment. With respect to Quebec, the United States notes that the record evidence of suppression of private stumpage prices that the United States has cited is only a sample of the record evidence.

24. Moreover, as discussed previously, this was not the only evidence on the record. Other facts concerning the governments' position as the dominant supplier of timber are consistent with the various statements on the record concerning price suppression. All of the evidence of the dominant influence of the provincial government on private stumpage prices, taken together, is more than sufficient to support the Commerce Department's preliminary determination that private prices could not logically serve as a valid market benchmark.

Standard of Review

25. As previous panels have recognized, what constitutes sufficient evidence to support a determination varies depending on the nature of the determination in question. At the time of the Preliminary Determination the investigation was, of course, incomplete. Canada appears to be asking the Panel to resolve the outstanding issues and render its own findings of fact. Accordingly, Canada has spent a great deal of time explaining the facts and statements it provided to the Commerce Department prior to the Preliminary Determination and even supplementing those facts with references to evidence submitted *after* the Preliminary Determination. In this proceeding, however, the preliminary record must speak for itself.

26. The question in this proceeding is whether Canada has established, based on the evidence before the Commerce Department at the time of the Preliminary Determination, that there is a breach of the cited WTO provisions. If there is a reasonable basis for the preliminary determination, as there is in this case, there can be no breach of the SCM Agreement. Moreover, Canada, as the complainant, bears the burden of establishing a *prima facie* case of a breach. Therefore, if the balance of evidence is inconclusive with respect to a particular claim, Canada must be held to have failed to establish that claim.

27. It is the view of the United States that an objective assessment of this matter, as presented here and in our prior submissions, and a proper application of the standard of review will lead the Panel to conclude that Canada has not established a breach of the cited WTO provisions.